Appendix A—Memorandum & Order of the United States District Court for the Southern District of New York (Brieant, J.) dated May 22, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BRIAN JONES,

Petitioner,

02 Civ. 1804 (CLB)

-against-

MEMORANDUM & ORDER

JOHN KEANE, Superintendent, etc.,

Respondent.

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Brieant, J.

By his counseled petition docketed March 6, 2002, Mr. Brian Jones, a state prisoner seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The following sets forth the findings of fact and conclusions of law of this Court, based solely upon the official record. The petition is timely and, as noted below, all claims have been subject to exhaustion, although the latter point is in dispute.

After a jury trial conducted before County Judge Patsalos of Orange County, Petitioner was convicted of murder in the 2nd degree, (depraved indifference murder) under Section 125.25(2) of the New York Penal Law and also of related weapons offenses in connection with the murder. The jury acquitted him of intentional murder under Section 125.25(1).

On the evening of June 17, 1996, at 11:00 P.M. in the City of Newburgh, Orange County, New York, the Petitioner fired two

shots which killed Germaine Fields, an eighteen year old male who had engaged in a street fight with Petitioner and others. Mr. Fields died. Mr. Jones fled but was arrested the following morning.

On December 20, 1996, the Court sentenced Petitioner on three different counts, the longest of which is nine years to life. The conviction was affirmed on direct appeal (*People v. Jones* 266 AD 2d 636) and leave to appeal was denied by the New York Court of Appeals on May 24, 2000 (*People v. Jones* 95 NY 2d 798). Thereafter, the Petitioner commenced a *coram nobis* proceeding in the Appellate Division claiming for the first time that he had been denied effective assistance of Appellate Counsel. He also moved in the County Court under New York CPL § 440.10, to vacate the judgment because of ineffective assistance by trial counsel. Both of these applications were denied, and leave to appeal from the denial of the Section 440.10 motion was denied by the Appellate Division on February 20th, 2002.

The Jury Challenges

The Petition alleges as a separate ground for relief that the Petitioner's trial attorney was ineffective because he failed to exhaust Petitioner's peremptory challenges and the appellate attorney was ineffective in failing on direct appeal to raise the jury selection issue. A juror, Shirley Grammas, was challenged for cause by defense counsel after she had told the Court that she hoped she would not be selected, and that she had diabetes and high blood pressure and feared that her sugar level and blood pressure might increase if she were involved in a verbal disagreement with other jurors, and that if she became emotionally upset, she might not be able to serve. There was no indication of bias, or that Ms. Grammas could not give a fair and impartial verdict.

Although the prosecutor did not oppose this challenge for cause, it was denied by the trial judge at a time when defense counsel had one peremptory strike remaining. The ineffective assistance is said to arise from the fact that Counsel did not premptorally strike Juror Grammas who because the twelfth member of the panel. The next prospective juror was sworn in as the first alternate without any challenge from Defense Counsel. This point is mentioned by Petitioner as supporting an inference that the Trial Counsel did not fail to exercise his last peremptory because he was concerned over the suitability of the next prospective juror.

No issue involving jury selection was raised by Appellate Counsel and, indeed, Appellate Counsel was not in possession of the transcript of the proceedings during which the jury was selected. The real point is that the trial judge had arguably denied improperly two previous challenges for cause, thereby forcing defense counsel to use two peremptories. In order to preserve these arguably erroneous rulings for appellate review, counsel had to exhaust all his peremptory challenges. This he did not do.

This issue is without merit. To prevail on such an issue, Petitioner must show cause and prejudice. There is no prejudice. The two prior challenged jurors did not serve, and there is no reason to find bias on the part of Ms. Grammas, who simply did not want to serve in a contested trial because of concern over her medical condition, tainted the verdict in any way.

The incident

Viewed most favorably to the Prosecution, the trial record shows that Petitioner, age 15 at the time of the event, was engaged in a sexual relationship with Latoya Williams, another minor, who was expecting Petitioner's child. Two or three days prior to the event, Miss Williams had informed Petitioner that

Germaine Fields had expressed an intention to stab Petitioner in the stomach. Petitioner had accused Fields of "coming on" to his girlfriend. Fields, a recent arrival in the community and purportedly a member of the Crips street gang, denied doing so.

On the evening of June 17, 1996, at about 11:00 P.M., in the street, three or four doors from Miss Latoya Williams home, she and Petitioner were in conversation, when Fields appeared out of the darkness and began cursing the Petitioner. Latoya's father, John Smith, entered the discussion. The confrontation escalated and ultimately Miss Williams and Fields became entangled in a struggle and both fell to the sidewalk with Latoya on top, being held by Fields. Petitioner shot Fields twice, from a distance of two feet pointing the gun downward at him while he was lying on the sidewalk on his back.

A large number of witnesses testified to having observed all or part of the crime scene. There was no credible evidence that the deceased was armed, although Petitioner testified he thought this to be the fact. It was clear that a violent fight was in progress immediately prior to the shooting, in which Fields was the aggressor. Both bullets struck Mr. Fields in the neck. He arrived at the emergency room of St. Luke's Hospital without a pulse and not breathing and died either on or shortly prior to arrival. On the early morning of June 18th, 1996, Petitioner was arrested at a motel in Poughkeepsie, registered under a false name.

The Challenge to the Statute

Petitioner testified in his own defense that he had been threatened by Fields and told to leave the scene or he would get killed. He said that he thought Fields had a gun and was reaching for an object in his pocket which appeared to be a weapon, while Fields was on the ground holding on to Latoya Williams. As soon as Field's hand entered his pocket, Petitioner

fired. Petitioner asserted that he was afraid Fields was going to kill him and was concerned that Latoya had been hurt by Fields. He claimed that at the time he fled he did not know whether Fields had been hit by either bullet. Petitioner testified that he was not trying to kill Field's but was just trying to hurt him. The jury is deemed to have rejected the contention of Petitioner that this intentional shooting was in self defense.

After all the evidence had been received, the defense asked that Trial Judge to charge the lesser included offense of criminally negligent homicide, New York Penal Law § 125.15, but this application was denied. As noted earlier, Mr. Jones was acquitted of intentional murder but found guilty of depraved indifference murder and the two weapons counts.

Sub-paragraph 2 of Section 125.25 of the New York Penal Law under which Petitioner was convicted defines an alternate version of murder in the second degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person". In contrast, Section 125.15 of the Penal Law which defines manslaughter in the second degree, reads in relevant part, as follows:

"A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person".

Petitioner argues as his second claim, that as a matter of constitutional law, there is no statutory distinction between reckless manslaughter, and depraved indifference murder, and that the statutory definition of depraved indifference murder is unconstitutionally vague.

Certainly this is not true on the face of the statutes and Petitioner apparently does not so contend. A persistent series of judicial glosses placed on the statutory use of "depraved indifference murder", by New York's highest court seems to have, in effect, removed any distinction between the two crimes. This, it is contended, thereby violates the constitutional rights of persons convicted under the more serious of the two offenses.

There is a statutory definition of recklessness found in Penal Law Section 15.05. A person acts recklessly "when he is aware of and consciously disregards a substantial and unjustifiable risk that [a result described by a statute defining an offense] will occur or that such circumstances exist." The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

There are a number of reported cases in the New York courts at all levels holding that the statutory reference to depraved indifference murder is not so vague as to violate substantive due process or equal protection rights of defendants. The words do possess a clear meaning in the general speech of the people and standing alone should be sufficient to give adequate warning to a non-lawyer member of the public as to what conduct is rendered unlawful by the statute. Classic textbook definitions abound: throwing the classic squib into the market place is depraved indifference. The New York Court of Appeals held in *People v. Jernatowski* 238 NY 188 (1924) that firing two or more shots from the street into a house where the Defendant knew that human beings were present, and killing one of the occupants constituted depraved indifference murder. In *People v. Poplis* 30NY 2d 85, 87 (1972), the New York Court of Appeals upheld the statute in a situation where "repeated brutal, callous and inhuman beatings" inflicted on a small child over several days resulted in injuries producing death.

Later, in *People v. Register* 60 NY 2d 270 (1983), cert. den. 466 US 953 (1984), the New York Court of Appeals considered a factual situation where the Defendant, intending to shoot one Mitchell, shot and killed another person. This case concerned primarily the issue of voluntary intoxication as bearing on intent, and arose in the context of a shooting incident in the early morning in a crowded saloon. The Court in *Register* held that the statutory phase "under circumstances evincing a depraved indifference to human life" referred only to the factual setting in which a crime occurs and contrasted the case with manslaughter in the second degree by holding that the "statute requires in addition not only that the conduct which results in death present a grave risk of death, but that it also occur under circumstances evincing a depraved indifference to human life". The Court held, "this additional requirement refers to neither the *mens rea* or the *actus reus.* If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur - objective circumstances which are not subject to being negatived by evidence of Defendant's intoxication." The Court also held that in a "depraved mind murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death (*Register*, 60 NY 2d 276). It went on to hold that the phrase refers to the "wantonness of Defendant's conduct and converts the *substantial* risk present in manslaughter to a *very substantial* risk present in murder (Id at p. 276-277). This seems to be a largely circular definition worthy of the committee that wrote the Internal Revenue Code, and tells us not very much. The dissenting opinion of Judge Jasen observed, and this Court agrees that the *Register* opinion "effectively eviscerated the distinction between manslaughter in the second degree, Penal Law Section 125.15(1) and murder in the second degree, Penal Law Section 125.25(2) with respect to the accused's state of mind", *Register* 60 NY 2d 282.

Later in *People v. Roe* 74 NY 2d 20 (1989), arising out of a killing resulting from Russian roulette (described by the perpetrator as Polish roulette), a majority of the Court, following *Register*, held that depraved indifference murder differs from manslaughter only in that the actor's reckless conduct must be imminently dangerous and present a grave risk of death, while in manslaughter, the conduct need only present a less substantial risk of death. This constitutes another play on words substantially similar to the definition imposed by the Court in *Register* and evoked a dissent by Judge Bellacosa, in which he observed that the majority "finalizes the obliteration of the classical demarcation between murder and manslaughter in this state" Roe 74 NY 2d at 29.

Later cases which continued this anomalous construction placed on the statute initially in the *Register* case include *People v. Cole* 85 NY 2d 990 (1995) and *People v. Johnson* 78 NY 2d 357 (1996). In the latter case, the Court of Appeals held that the language was not unconstitutionally vague, because conduct with depraved indifference to human life is well understood.

This Court agrees that the concept of depraved indifference to human life is well understood, and is essentially self-defining notwithstanding the confusing glosses placed on the statute by *Register* and its progency. But when two different statutes are construed by New York's highest Court to reach the same conduct, or indistinguishable conduct, and one carries a far lesser penalty, allowing a grand jury to choose to indict for either one is a clear denial of equal protection.

More likely, once the jury concluded that self defense was not involved, this case really became one of intentional

homicide.[1] The opportunity to submit what is at least by appearance a lesser included offense to intentional murder to the jury, as was done in this case, allows hesitant compromisers to reach a verdict under conditions such as in this case, where they were apparently reluctant to convict Mr. Jones of intentional murder. There is nothing in our constitutional jurisprudence to prevent this.

Clearly it cannot be said that the statute is vague as applied in the case of a person who deliberately pumps two shots into the neck of someone who is lying on the ground at a distance of two feet. It is ordinarily thought that one who has received from a statute fair warning of the criminality of his own conduct, is not entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. *Parker v. Levy* 417 U.S. 733, 756 (1973); *United States v. Rybicki*, 287 F. 3d 257, 263 (2d Cir. 2002).

In most cases, where a penal statute is found unconstitutionally vague as applied, the result is that the accused goes free. This is not such a case, because the conduct of which Mr. Jones was convicted, as apparently viewed by the jury, would have resulted in a conviction for the lesser crime of reckless manslaughter. That the New York Court of Appeals has conflated the two statutory crimes is a matter of considerable concern to this Court. That the New York caselaw has merged this offense with the less serious available charge of manslaughter 2d, raises a serious issue of equal protection, and a strong possibility of prosecutorial discrimination against minorities or unpopular defendants. This Court concludes that the conviction for depraved indifference murder as applied to

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[1] While New York law requires a person asserting self-defense to "retreat to the wall", in practice juries tend to apply the standards of the OK Corral when the facts show a killing really was committed in self-defense.

the facts of the case as the jury must have found them violated Petitioners' Constitutional right to the equal protection of the laws, as well as substantive due context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.

Conclusion

Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was permitted to convict him of the most severely punished of two statutory crimes which under the state's reported decisions had become one. The Writ shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. The Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality.

SO ORDERED.

Dated: White Plains, NY
May 22, 2002

s/CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit dated May 13, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002
(Argued: February 19, 2003 Decided: May 13, 2003
Amended: May 14, 2003)
Docket No. 02-2382

BRIAN JONES,

Petitioner-Appellee,

-v.-

JOHN KEANE, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY,

Respondent-Appellant.

Before:

OAKES, KEARSE, AND B. D. PARKER, JR.,
Circuit Judges.

Appeal from the grant of a petition for a writ of habeas corpus by the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*). The Court concluded that New York's second-degree murder statute, N.Y. Penal Law § 125.25(2), under which petitioner-appellee Brian Jones was convicted, was unconstitutionally vague because it

covered conduct indistinguishable from that covered by New York's significantly less serious reckless manslaughter statute, N.Y. Penal Law § 125.15. Since Jones failed to exhaust this claim, we reverse.

ANDREW R. KASS, Assistant District Attorney (Richard A. Brown, District Attorney of Queens County, John M. Castellano, Assistant District Attorney, of counsel and on the brief), for Francis D. Phillips, II, District Attorney of Orange County, Goshen, NY, *for Respondent-Appellant.*

ROBERT N. ISSEKS, (Alex Smith, on the brief), Middletown, NY, *for Petitioner-Appellee.*

B. D. PARKER, JR., *Circuit Judge*:

Respondent-appellant John P. Keane, superintendent of the Woodbourne Correctional Facility, appeals the grant of Brian Jones's petition for a writ of habeas corpus by the United States District Court for the Souther District of New York (Brieant, J.). Jones claimed, and the court agreed, that the New York second-degree murder statute, under which he was convicted, was unconstitutionally vague. *See* N.Y. Penal Law § 125.25(2). Although he had not raised this argument in state-court proceedings, Jones argued that the claim was nonetheless exhausted because of its close relationship with an insufficiency-of-the-evidence claim he had raised on direct appeal. Since we conclude the claim was exhausted, we reverse.

I. BACKGROUND

Jones was convicted by a jury in County Court, Orange County, New York, of Murder in the Second Degree[1] and Criminal Possession of a Weapon in the Second[2] and Third Degrees[3] and sentenced in December 1996, as a juvenile, to concurrent sentences of nine years to life on the murder charge, two to six years on the second-degree weapons-possession charge, and one to three years on the third-degree weapons-possession charge. The conviction stemmed from a June 1996 altercation in the City of Newburgh, involving Jones, LaToya Williams (Jones's girlfriend), and Germaine Fields. While attempting to separate the two young men, Williams fell to the ground with Fields. Jones then fired two shots, killing Fields. At trial, Jones testified that he did not intend to kill Fields but, fearing that he was armed, was animated at least in part by concerns of self defense.

Jones was charged with one court of intentional murder under N.Y. Penal Law § 125.25(1), one count of depraved indifference murder under N.Y. Penal Law § 125.25(2), and criminal possession of a weapon in the second and third degrees. The jury acquitted Jones of intentional murder, but, as noted,

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[1] N.Y Penal Law § 125.25(2), provides that a person is guilty of murder in the second degree when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

[2] To the extent pertinent here, under N.Y. Penal Law § 265.03, a person is guilty of criminal possession of a weapon in the second degree when he possesses a loaded firearm "with intent to use the same unlawfully against another."

[3] To the extent pertinent here, under N.Y. Penal Law § 265.02, a person is guilty of criminal possession of a weapon in the third degree when he possesses a loaded firearm unless "such possession takes place in such person's home or place of business."

convicted him of second-degree ("depraved indifference") murder and on the two weapons-possession counts.

On direct appeal, Jones argued that the evidence at trial was insufficient to establish his guilt on the second-degree murder charge and that, instead, the evidence showed that his actions were justified "due to a reasonable fear for his safety." This argument was rejected by the Appellate Division, which affirmed Jones's conviction. *People v. Jones*, 696 N.Y.S.2d 902 (2d Dep't 1999). Leave to appeal was denied by the New York Court of Appeals. *People v. Jones*, 95 N.Y.2d 798 (2000). Jones then applied for writ of error *coram nobis*, asserting that he was denied effective assistance of appellate counsel. This application was denied. *People v. Jones*, 732 N.Y.S.2d 361 (2d Dep't 2001). Jones also moved in the County Court under N.Y. Crim. Proc. Law §440.10 to vacate his conviction because of ineffective assistance of trial counsel. But this motion was also denied, as was leave to appeal it.

Jones then turned to federal court, filing a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. In this petition, Jones asserted, as in state court, that the evidence was insufficient to support his murder conviction and that his trial and appellate counsel had provided ineffective representation. Jones also argued, however, that the crime of depraved indifference murder is unconstitutionally vague, owing to "confused and contradictory" efforts to interpret "depraved indifference" by the New York Court of Appeals. Hab. Pet. at 18. These efforts, Jones contended, have made depraved indifference murder indistinguishable from the crime of reckless manslaughter. This elision, according to Jones, creates the potential for unconstitutional variances in the charges prosecutors can lodge

and sentences that may be imposed for essentially the same conduct.[4]

More specifically, Jones argues that the New York Court of Appeals erred in concluding, beginning with *People v. Register*, 60 N.Y.2d 270 (1983), that depraved indifference murder does not require "an 'uncommonly evil and morally perverse frame of mind,'" *People v. Sanchez*, 98 N.Y.2d 373, 383 (2002) (quoting *id.* at 396 (Rosenblatt, J., dissenting)), and instead that "the crux" of this crime "is recklessness exaggerated by indifference to the circumstances objectively demonstrating the enormity of risk of death from the defendant's conduct." *Id.* at 380. Jones contends that the depraved indifference murder statute is unconstitutional, as so interpreted, because it cannot be distinguished from reckless manslaughter, which occurs when a person "recklessly causes the death of another person." N.Y. Penal Law § 125.15(1).

The "failure of the [depraved indifference] statute to adequately define the more serious *mens rea*" creates the risk, according to Jones, "that prosecutors and juries [will] arbitrarily and erratically determine which crime to prosecute or to apply." Appellee Br. at 25 (citing, among other authorities, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"

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[4] Although reckless manslaughter carries a minimum punishment of only a year in prison, depraved indifference murder carries a minimum punishment of 15 years in prison. *See* N.Y. Penal Law § 70.00(3)(a) and (b); *People v. Sanchez*, 98 N.Y.2d 373, 407 (Rosenblatt J., dissenting).

(quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974))).[5] While conceding that this claim had not been specifically raised in state court, Jones asserted that his vagueness claim was nonetheless exhausted because it was "interrelated" with an insufficiency-of-the-evidence claim raised on direct appeal.

The District Court granted the petition. It first concluded that the depraved indifference murder and reckless manslaughter statutes were, on their face, neither vague nor indistinguishable. But it accepted Jones's argument that attempts by the New York Court of Appeals to interpret "depraved indifference" had resulted in "a largely circular definition worthy of the committee that wrote the Internal Revenue Code" and had effectively eviscerated any meaningful distinction between depraved indifference murder and reckless manslaughter. Mem. and Order, May 22, 2002, at 8. The District Court found that the conflation of conduct covered by the two closely related crimes violated equal protection and substantive due process. It further agreed with Jones that presenting his insufficiency-of-the-evidence claim in state court sufficed to exhaust his vagueness claim, finding the two "substantially the same." *Id.* at 11.

II. DISCUSSION

We review *de novo* the District Court's grant of habeas corpus and we review its factual findings for clear error. *Jenkins v. Artuz*, 294 F.3d 284, 290 (2d Cir. 2002). Although the parties

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[5] Jones's position is shared by some members of the New York Court of Appeals, who have dissented when that court has rejected similar vagueness challenges. *See. e.g., Register*, 60 N.Y.2d at 281-88 (Jasen, *J.*, dissenting); *People v. Roe*, 74 N.Y.2d 20, 29-38 (1989) (Bellacosa, *J.*, dissenting), *Sanchez*, 98 N.Y.2d at 407 (Rosenblatt, *J.*, dissenting) ("[T]he *Register* Court's formulation has the effect of treating defendants with the exact same mental culpability unequally by giving them vastly different sentences even though their moral culpability is identical.").

raise a number of issues, we address principally the exhaustion issue since we conclude it is dispositive.

A. Vagueness and Exhaustion

With exceptions not relevant here, federal habeas relief is not available unless "the applicant has exhausted the remedies available in the courts of the State."[6] 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement "springs primarily from considerations of comity" between the federal and state judicial systems. *Daye v. Att'y Gen. Of N.Y.*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc). By requiring exhaustion, federal courts recognize that state courts, "no less than federal courts, are bound to safeguard the federal rights of state criminal defendants." *Id.* Besides serving "to minimize friction between our federal and state systems of justice," *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam), the exhaustion requirement has the salutary practical effect of enhancing the familiarity of state courts with federal constitutional issues. *See Rose v. Lundy*, 455 U.S. 509, 519 (1982).

Exhaustion requires a petitioner fairly to present the federal claim in state court. *See Strogov v. Att'y Gen. Of N.Y.*, 191 F.3d 188, 191 (2d Cir. 1999). "A petitioner has 'fairly presented' his claim only if he has 'informed the state court of both the factual and the legal premises of the claim he asserts in federal court.'" *Dorsey v. Kelly*, 112 F.3d 50, 52 (2d Cir. 1997) (quoting *Daye*, 696 F.2d at 191). The claim presented to the state court, in other words, must be the "substantial equivalent" of the claim raised in the federal habeas petition. *Strogov*, 191 F.3d at 191 (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971)).

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[6] As modified by AEDPA, the federal habeas statute permits federal courts to *deny* unexhausted claims on the merits. *See* 28 U.S.C. § 2254(b)(2).

As noted, the District Court found that the insufficiency of the evidence claim that Jones presented in state court was the substantial equivalent of the claim of unconstitutional vagueness raised in his federal habeas petition. The court also expressed concern that presentation of the vagueness claim in state court may well have been futile. As explained by the District Court:

> Petitioner argues, and this Court agrees, that in the context of this case, raising in the state court the issue of insufficiency of the evidence was sufficient to raise ("inextricably intertwined with") a challenge to the statutory criteria for distinguishing reckless manslaughter from depraved indifference murder.
>
> The requirement for exhaustion is not intended to exhaust the petitioner or his or her lawyers, but is designed to give the state courts the opportunity to address and correct violations of Constitutional rights. That purpose is fulfilled when the state court has a fair and meaningful chance to grant relief on what is substantially the same claim raised in federal court. *O'Sullivan v. Boerckle[,]* 526 U.S. 838, 844 (1999)[;] *Vasquez v. Hillary[,]* 474 U.S. 254, 257 (1986). In the context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.[7]

Mem. and Order, May 22, 2002, at 11-12.

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[7] The District Court's reference to New York Court of Appeals Judges Bellacosa and Jasen is to dissenting opinions authored by these Judges. *See supra* note 5.

But the fact that the New York Court of Appeals may have been unlikely to grant Jones relief on his vagueness claim does not cure his failure to have raised it in state courts. It is well established that a petitioner may not bypass state courts merely because they may be unreceptive to the claim. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) ("'[F]utility cannot constitute cause,'" for procedural default because of failure to raise claim on direct review, "'if it means simply that a claim was unacceptable to that particular court at that particular time.'") (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982) (internal quotation marks in *Engle* omitted)); *Rosario v. United States*, 164 F.3d 729, 733 (2d Cir. 1998).

We also conclude that the insufficiency-of-the-evidence claim Jones asserted on direct appeal was not substantially the same as his vagueness claim since the insufficiency claim did not alert the state court to a claim of statutory vagueness. In his insufficiency claim, Jones did not challenge the type of conduct that would constitute depraved indifference murder but argued that sufficient evidence had not been presented at trial. Indeed, Jones recited the elements of second-degree murder in his appeal, without indicating any concern that these elements were unconstitutionally vague:

> In order to be found guilty of second degree murder [citation omitted] the People were required to prove that "under circumstances evincing a depraved indifference to human life" Appellant engaged in conduct which creates a grave risk of death and causes the death of another person. This simply was not proven.

Appellee Br. before N.Y. App. Div. At 9.

Sometimes, of course, issues of vagueness and of the sufficiency of the evidence may overlap. In *Strogov*, for example, a habeas petitioner, who had been convicted in state

court of grand larceny for submitting fraudulent Medicaid billing claims, argued on appeal that the evidence presented at trial did not establish her criminal intent to violate the statute, because the Medicaid billing code was ambiguous. But even there, where claims of vagueness and insufficiency were explicitly linked, we held that reliance on a statute's ambiguity in support of an insufficiency of the evidence claim on appeal did not suffice to exhaust a constitutional vagueness claim raised in the habeas petition, because the petitioner had failed to present the state courts with "'essentially the same legal doctrine'" asserted in the habeas petition. 191 F.3d at 192 (quoting *Daye*, 696 F.2d at 191-92).

In advancing his insufficiency claim in state court, Jones did not argue that New York's depraved indifference murder statue was unconstitutionally vague. Instead, he argued that the evidence demonstrated that he reasonably believed that Fields possessed a weapon and that he, fearing for his life, reacted in self defense. In other words, in the state courts, Jones pressed his claim of self defense; he presented neither the factual nor legal premises underpinning his subsequent claim that the statute itself was unconstitutionally vague. Accordingly, Jones failed to exhaust this claim. *See Strogov*, 191 F.3d at 193.

We also agree with respondent that Jones has procedurally defaulted his vagueness claim since New York's procedural rules now bar Jones from raising it in New York courts. Further direct review by the Court of Appeals is no longer available, *see* N.Y. Rules of Court, Court of Appeals, § 500.10(a) (authorizing only one request for review of conviction), and the failure to have raised the claim on direct review now forecloses further collateral review in state court. *See* N.Y. Crim. Proc. Law § 440.10(2)(c) (barring review if claim could have been raised on direct review). In the case of procedural default, we may reach the merits of the claim "only if the defendant can first demonstrate either cause and actual prejudice, or that he is

actually innocent." *Bousley*, 523 U.S. at 622 (internal quotations and citations omitted). Since Jones has not attempted to meet this standard, we do not reach the merits of his claim.

B. Other Claims

Jones also urges us to affirm the District Court's grant of habeas relief on alternative grounds: that the evidence was insufficient to establish his guilt, that his trial counsel was ineffective for failing to exhaust his peremptory challenges—so as to preserve his ability to appeal the trial court's denial of certain challenges for cause—and that his appellate counsel was ineffective for failing to raise this claim on appeal. We cannot consider these alternative grounds, however, because "a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of appealability permitting him to argue that ground." *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir. 2003). Jones has not received a certificate of appealability on any grounds not adopted by the District Court. Moreover, were we to treat his appellate brief as a request for such a certificate, we would deny the request because he has failed to make a substantial showing of the denial of a constitutional right. *See id.* at 209-10; 28 U.S.C. § 2253(c)(2).

CONCLUSION

For the foregoing reasons, the judgment of the District Court is reversed and Jones's petition is dismissed.

Appendix C - Amended Judgment of the United States District Court for the Southern District of New York dated June 6, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Brian Jones,

02 CV 1804 (CLB)

Petitioner,

AMENDED
JUDGMENT

-against-

John Keane, Superintendent,
Woodbourne Correctional Facility,

Respondent.

- x

Whereas the above entitled action having been assigned to the Honorable Charles L. Brieant, U.S.D.J., and the Court thereafter on May 22, 2002, having handed down a Memorandum and Order that Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was permitted to convict him of the most severely punished of two statutory crimes which under the state's report decisions had become one. The Writ of habeas corpus shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. It is further ordered that the clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality, it is,

ORDERED, ADJUDGED AND DECREED: that Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was

permitted to convict him of the most severely punished of two statutory crimes which under the state's report decisions had become one, and the Writ of habeas corpus shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree, and it is further,

ORDERED, ADJUDGED AND DECREED: that the Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality.

Dated: White Plains, N.Y.
June 6, 2002

s/James M. Parkinson
Clerk

U.S. DISTRICT COURT
Filed
JUN 6 2002
W.P.
S.D. OF N.Y.

MICROFILM
JUN 6 2002
USDC SD NY WP

DOCKETED AS
A JUDGMENT
ON JUNE 6, 2002

Appendix D - Judgment of the United States Court of Appeals for the Second Circuit dated July 3, 2002

MANDATE

United States Court of Appeals
For The
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of May, two thousand and three.

Before: Hon. James L. Oakes,
Hon. Amalya L. Kearse,
Hon. B.D. Parker, Jr.,
Circuit Judges

Docket No. 02-2382

BRIAN JONES,

Petitioner-Appellee,

v.

JOHN KEANE, SUPERINTENDENT,
WOODBOURNE, CORRECTIONAL FACILITY,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court is REVERSED and Jones' petition is DISMISSED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By

s/Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

A TRUE COPY
ROSEANN B. MACKECHNIE, CLERK

By Yolanda (illegible)
Deputy Clerk
Date:

Issued as Mandate: JUL 3 2003

UNITED STATES COURT OF APPEALS
FILED
MAY 13 2003
Roseann B. Mackechnie, Clerk
SECOND CIRCUIT